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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1136

EDITH COLBERT FINCH, WILLIAM L. COLBERT, FARRIS COLBERT BROWN, SHIRLEY REAGAN HESKITT, ROGER KING, SHERRIE LEE HESKITT,

Petitioners,

VERSUS

UNITED STATES OF AMERICA and STEWART UDALL, Secretary of U. S. Department of the Interior,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the

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OCTOBER TERM, 1967

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EDITH COLBERT FINCH, WILLIAM L. COLBERT, FARRIS COLBERT BROWN, SHIRLEY REAGAN HESKITT, ROGER KING, SHERRIE LEE HESKITT,

Petitioners,

VERSUS

UNITED STATES OF AMERICA and STEWART UDALL, Secretary of U. S. Department of the Interior,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Your petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on December 20, 1967.

I.

OPINIONS BELOW

That petitioners are seeking a Writ of Certiorari for the review of the order and judgment of the United States District Court for the Western District of Oklahoma, No. 66-278 Civil, entered February 6, 1967, in the above style,

cited at 263 F.Supp. 309 (1967), *infra,* Appendix "B," pp. ix-xvi, and the judgment of the United States Court of Appeals, Tenth Circuit, No. 9474, entered on December 20, 1967, which have not been reported in the Federal Reporter system to date, *infra,* Appendix "C," pp. xvi-xxii).

II.
JURISDICTION

That on the 20th day of December, 1967 judgment was entered for the defendants appellee, United States of America, Stewart Udall, Secretary of the United States Department of the Interior, by the United States Court of Appeals, Tenth Circuit, sitting in the November Term, the judgment also being dated the 20th day of December, 1967.

Petitioners further show to this Court that upon receipt of a copy of the judgment from the United States Court of Appeals, Tenth Circuit, a motion for Stay of Mandate was made to said court upon the 19th day of January, 1968, pending the filing of petition for Writ of Certiorari, and that no other pleadings have been filed herein.

The statutory provision, conferring upon this Court jurisdiction to review the judgment of the United States Circuit Court of Appeals, Tenth Circuit, by Writ of Certiorari, is as follows, to-wit:

> "Title 28, U.S.C., Section 1254 (1): Cases in the Court of appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

III.
QUESTIONS PRESENTED

The questions submitted by petition for review by the Supreme Court are as follows, to-wit:

(1) When, under Section 4 of the General Allotment Act of 1887, 24 Stat. 388, 389, as amended, 25 U.S.C., Section 334, an Indian receives a Certificate of Eligibility and selects the requisite amount of land allowed under the aforesaid Act, can this Indian individual be denied his indefeasible right to a Certificate of Allotment of this particular piece of land which he selects because of a subsequent Federal Statute, *i.e.*, Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1269, 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C., Section 315(f), which has the effect of withdrawing all public domain lands, reclassifying the same into grazing districts, and giving to the Secretary of the Interior absolute right and control, which parcels of land shall be permitted to be used for Indian allotments, thus having the power to ignore completely the individual Indian's Certificate of Allotment, and having the effect of removing all public domain land from potential Indian allotments, which, in turn has the effect of destr ying the Indian's right conferred upon him under the General Allotment Act of 1887, cited earlier.

(2) When, assuming the validity of Section 7 of the Taylor Grazing Act, 43 U.S.C., Section 315(f), insofar as it affects the General Allotment Act of 1887 cited at 25 U.S.C., Section 334, giving to the Secretary of the Interior discretionary power to examine and classify lands with-

drawn pursuant to the Taylor Grazing Act, was the Secretary of Interior's action in refusing to reclassify the particular land in question sought by the petitioners a reasonable exercise of his discretionary power?

(3) When a Certificate of Eligibility is granted to an Indian under Section 4 of the General Allotment Act, 25, U.S.C., Section 334, and the individual Indian does everything within his power and within the law to perfect a Certificate of Allotment for a certain parcel of land which he selects, but is denied his Certificate of Allotment through the use of a subsequently passed statute, *i.e.*, the Taylor Grazing Act, 43 U.S.C., Section 315(f), is not the individual Indian being denied a substantial property right which should be and is protected by the Fifth Amendment to the United States Constitution?

IV.
STATUTES AND REGULATIONS INVOLVED

Petitioners state that at this time, since there are numerous statutes and regulations and treaties involved in this particular case, only the citation of the treaties, statutes and regulations will be set out, and that the statutes, treaties and regulations will be cited and written out verbatim in the Appendix D. The following constitutes a list of all citations pertinent to a decision in this case:

(1) Section 4 of the General Allotment Act of 1887, 24 Stat., 388, 389, as amended, 25 U.S.C., Section 334.

(2) Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1269, 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C., Section 315(f).

(3) Act of February 6, 1901, 31 Stat. 1760, as amended, 25 U.S.C., Section 346 (r. 1, 12, 122).

(4) 43 C.F.R. 2212.2-2(b).

(5) Question and Answer Bulletin about the Indian Allotment on Public Land, issued by the United States Department of the Interior under date of May, 1964, page 6, entitled "Decisions after Enactment of the Taylor Grazing Act."

V.

STATEMENT

Your petitioners state that this action was brought by petitioners to obtain a judgment directing the United States of America and the Secretary of the Interior to issue Patents to the respective petitioners to certain lands, to which they claim they are entitled, as allotments under Section 4 of the General Allotment Act, February 8, 1887 (24 Stat. 389, as amended, 25 U.S.C., Sec. 334).

The appellants sought to invoke jurisdiction under Section 2 of the Act of February 6, 1901 (31 Stat. 1760, as amended; 25 U.S.C. 346), and assert that the individual petitioners are Indians who are entitled to allotments of land, and that the court has the power to require the issuance of Allotment Patents under Section 1 of the 1901 Act (25 U.S.C., Sec. 345).

The appellants filed Indian Allotment Applications with the Area Director of the Muskogee Area Office, Bureau of Indian Affairs, and received certificates that they were eligible as Indians to receive land under the Public Domain pursuant to Section 4 of the Act of February 8,

1887 (24 Stat. 389, as amended; 25 U.S.C., Section 334). The appellants thereafter filed application with the Land Office of the Bureau of Land Management in Denver, Colorado for allotments in Sections 10, 11, 14 and 15, Township 19 South, Range 45 West, Sixth Principal Meridian, Kiowa County, Colorado. The appellants, except Sherrie Lee Heskitt, sought allotments on 160 acres of land, and Sherrie Lee Heskitt sought an allotment on 80 acres of land.

On April 1, 1966 the State Director of the Bureau of Land Management in Denver, Colorado, rendered a decision refusing to classify the lands located in Colorado as suitable for Indian allotments under Section 4 of the General Allotment Act (24 Stat. 389, as amended; 25 U.S.C., Section 334). It was concluded that the lands applied for do not have the capability of serving the purpose for which Section 4, *supra,* was enacted, and that the land is not able to support an Indian family. The decision of the State Director was submitted by appellants for review by the Secretary of the Interior and the Secretary failed to exercise his supervisory authority. The decision of the State Director therefore became a final administrative order thirty days after the issuance thereof.

Prior to the filing of the application by appellants, unappropriated public lands in the State of Colorado were withdrawn from settlement and were reserved for classification and determination of their most useful purpose pursuant to the provision of the Taylor Grazing Act of June 26, 1936, 46 Stat. 1269; 43 U.S.C., 315, *et seq.* The lands to which appellants seek allotment were determined to be the most useful for grazing purposes. The appellants exhausted their administrative remedies and it is ad-

mitted that the case was before the court for judicial review of the administrative acts of the Secretary and his subordinates.

Appellants sought also a judgment against the United States of America for the value of the land in the total of $192,000.00 as alternative relief in the event the court found that the Department of the Interior had disenabled the Government from the issuance of patents by reason of an arbitrary classification which would disenable the Government from fulfilling its obligation under the General Allotment Act of February 8, 1887, cited earlier.

Petitioners, having exhausted all administrative and inferior court remedies, now petition this Honorable Court for a Writ of Certiorari so that this vital question concerning the property rights of all Indians who are eligible for their statutory allotment of land under the General Allotment Act, cited earlier, may be determined by this Honorable Court.

The original Federal jurisdiction was founded upon Section 4 of the General Allotment Act of 1887, 24 Stat. 388, 389, as amended; 25 U.S.C., Section 334; Act of August 15, 1894, 28 Stat. 286, 305, as amended; 25 U.S.C., Section 345; and Act of February 6, 1901, 31 Stat. 360, as amended; 25 U.S.C., Section 346; and 28 U.S.C., Sections 1361 and 1391(e).

VI.
REASONS FOR GRANTING WRIT

By holding that the Taylor Grazing Act, 43 U.S.C., Section 315(f), has reclassified all land or a substantial portion of all the Public Domain Lands, and withdrawn said lands from settlement or availability to applicants formerly entitled to grants of Public Domain Lands, such as your petitioners, results in vitiating the General Allotment Act of 1887, 25 U.S.C., Section 334, by granting to the Secretary of the Interior complete discretionary power as to whether he desires to reclassify any of this land which has been withdrawn; particularly where the Secretary of the Interior has made a covenant that no land will be reclassified to satisfy the conditions of the General Allotment Act of 1887, cited earlier.

Various reasons have been given for sustaining the Secretary's actions. One of these reasons is that the land is too poor in quality to be farmed successfully by an Indian family. (See pages viii to x, Appendix "A.") This reason is in no way relevant to a Certificate of Allotment desired upon grazing lands, which this land has admittedly been classified. Your petitioners cite page viii of Appendix "A," and Section 4 of the General Allotment Act, Appendix "D," page xxiii, which contains no reference to how valuable or how suitable for farming the particular piece of land has to be which is selected by an Indian applicant.

A second reason for denying the Certificate of Allotment from this particular property is that no settlement has been made on the aforesaid property. Your petitioners state that all requirements, as set forth on

Budget Bureau approved Form No. 42-F1363.1, have been fulfilled, and that settlement is a condition subsequent only and that the Certificate of Allotment must be granted on a particular piece of land before settlement can lawfully be made; otherwise, the Indian applicant would be violating the law as a trespasser, 43 C.F.R., 2212.2-2(b) (Appendix "D," page xxv).

Your petitioner further states that the subsequent passing of the Taylor Grazing Act and the reliance thereon by the Secretary of the Interior to deny the Indian applications is effectively abrogating the rights of Indian citizens, which had been conferred by the Allotment Act.

In the case of *Chase* v. *United States*, 222 Fed. 93, 138 C.C.A. 117, the Court said:

> "No Act of Congress or legislative fiat may diminish rights of Indian appellants once conferred."

Your petitioners further state that in effect the subsequent passage of the Taylor Grazing Act sterilizes an Act of Congress, *i.e.*, the Indian Allotment Act, by withdrawing and thereby "reclassifying" all public domain land which would be available for use under the Indian Allotment Act. The plaintiff cites the Question and Answer Bulletin about the Indian Allotment on Public Land, issued by the United States Department of the Interior under date May, 1964, page 6, wherein it is recited under the title, "Decisions After Enactment of the Taylor Grazing Act":

> "After the passage of the Taylor Grazing Act, virtually all unappropriated public lands outside of Alaska were withdrawn from entry. Section 7 of the Taylor Grazing Act permits the Secretary of the Interior to revoke this withdrawal under certain stated con-

> ditions. Decisions issued after the Taylor Grazing Act make reference both to the settlement nature of the allotment act and also to the other factors which now apply. * * *"

Thus, it is apparent that there is no land available for Indian settlement under the Indian Allotment Act that is not subject to the discretionary power of the Secretary of the Interior to make this land available.

Your petitioners state that even if the Taylor Grazing Act is held to be applicable to cases arising under the Indian Allotment Act, the Secretary of the Interior has abused his discretionary authority by denying the Certificate of Allotment on the grounds that the property was too poor in quality, as above stated. The individual Indians desiring this particular piece of property have not set forth any desire to farm this property, but rather have selected this property because it comes within the classification of grazing lands, and potential oil development. Under the case of *United States* v. *Arenas* cited at 158 F.2d 730, *certiorari denied* 67 S.Ct. 1531 and 331 U.S. 842 (1947), 91 L.Ed. 1853, the Court held:

> "The Secretary of the Interior cannot refuse Indian lands as required by Congressional Act merely because he thinks these lands were too valuable."

In our case, the Secretary has simply circumvented the decisions of the Court by finding that the lands are too poor in quality; thus, it would clearly indicate that he has abused his authority in denying the claims on the basis that the land was too poor in quality under the law and facts.

This is a case of first impression before the Supreme Court, and for that reason your petitioners believe that the decision in *United States* v. *Northern Pacific Railroad Company,* 311 U.S. 317, 61 S.Ct. 264 (1940) would be helpful in determining the outcome of a case involving the Indian Allotment Act, as these two cases are similar in that the railroad had received as a certain land grant which was about to be extinguished through the passage of subsequent statutes. The Court said:

> "Under the ruling of the forest preserve case it was the obligation of the Government to refrain from any action which would deprive the company of its right of selection in accordance with the terms of the grant. When the United States withdrew the lands for forest and other reserves, it signified its purpose to retain them for its own use and not to allow the company or anyone else to obtain them, any law or contract to the contrary notwithstanding. We think the company's right of selection to the extent of deficiency in the grant remained available as to the withdrawn lands, provided the lands selected were such as are defined in the grant."

In the instant case the Indian allottees have chosen a particular parcel of land, which is designated "grazing land." This is in accordance with the Indian Allotment Act of 1887.

As has been stated earlier, the principal part of all public domain lands under this classification has been withdrawn and reclassified pursuant to the Taylor Grazing Act; thus, the Indian allottees herein are being denied their statutory right conferred upon them under the Indian Allotment Act of 1887 through the use of the subsequently passed Taylor Grazing Act. This, your petitioners state, is

in direct contravention of the Fifth Amendment to the United States Constitution providing that an individual's property rights cannot be taken away without due process of law.

In the case of *United States* v. *Northern Pacific Railroad Company*, 256 U.S. 51, 41 S.Ct. 439 (1921), the railroad had a contract with the Government, whereby it would build a railroad through Montana, and the Government would give to the railroad alternate sections of land on either side of the track, extending the length of the track. This was subject to the rights of homesteaders, or preemption. If either of these occurred, the railroad could not acquire the land as prescribed, and the Government would permit the railroad to choose other lands to make up the indemnity limit promised by the Government.

When the railroad attempted to enforce their contract with the Government and select other land, the Government Bureau of Land Management issued patents to the land to the railroad company, and then decided that it had made a mistake. The Secretary of the Interior alleged that there had been a temporary Executive withdrawal of the lands in January, 1904, pending an inquiry as to the desirability of adding this land to the forest reserve, which was done in 1906. The indemnity selection, however, was made in 1905.

The Court held that these lands could not be reserved by the Government, effecting a removal of the lands from appropriation as indemnity lands by the railroad, because the railroad had earned the right to these lands under the Act of July 2, 1864, ch. 217, 13 Stat. 365, and the Government cannot by reclassification make this land unavailable

for these said purposes. The case was remanded to the District Court in order to determine whether there actually was a shortage in the land along the railroad that this company was entitled to because the railroad had not made a selection and identification of the particular lands sought to be taken, and without one or the other, then the railroad would lose.

In our case there has been a specified selection and identification of the lands sought. There is an agreement antecedent to any Act or reclassification by the Government to give the Indians 160 acres of land, 25 U.S.C. 334, 346, and any subsequent withdrawal of lands is subject to the Indian's right of selection on that land. See *Leecy* v. *United States,* Eighth Cir., 190 Fed. 289, 292 (1911):

> "Congress authorized the allotment of these lands and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the Government he would be executing an Allotment law under the rules and regulations prescribed when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be distributed."

Under the case of *Choate* v. *Trapp, et al.,* 224 U.S. 655, 667, 32 S.Ct. 565, it was determined that Congress could not divest vested rights once conferred with reference to Indian allotments. Also in the case of *Young* v. *Felornia,* 121 Utah 646, 244 P.2d 862 (1952) is an action by the plaintiffs who had received permits pursuant to the Taylor Grazing Act to enjoin defendant Navajo Indians from using this land. The Courts held in favor of plaintiffs by

way of summary judgment because the Navajo Indians had by treaty extinguished their rights in this particular land; however, in commenting on the effects of the Taylor Grazing Act, the Supreme Court of Utah said:

> "* * * True, as asserted by appellants, the Taylor Grazing Act did not authorize the Secretary of the Interior to deprive Indians or others of property rights which they theretofore had on public domain * * *"

Your petitioners further state that it is not a matter of whether they are asserting an absolute right to the particular lands in question, since it is apparent that no land is going to be reclassified by the Secretary of the Interior for the purpose and uses of the Indian Allotment Act, and no useful purpose would be served if these particular petitioners were to file applications on every piece of public domain land, just to be denied that application.

Due to the importance of this question to all Indian citizens of the United States who have not received their allotment and are qualified therefor, your petitioners believe that a decision by this Honorable Court is the only way in which they can be assured of receiving the full benefit of the General Allotment Act of 1887. Furthermore, this case presents an important question of Federal law and public interest which can only be resolved through a decision of the Supreme Court of the United States.

VII.
CONCLUSION

Petitioners are in complete accord with the decision of the court below in its holding that the Taylor Grazing Act does not sterilize an Act of Congress, to-wit:

The Indian Allotment Act of 1887.

That this part of the decision standing alone is correct, however, petitioners do take issue with the holdings of the court below in upholding the administrative acts of the Secretary of the Interior as not being arbitrary and capricious and that his departmental administrative rules and his construction thereof under the Taylor Grazing Act does not in legal effect permit a usurpation of a power conferred on Congress.

This opinion is predicated on the proposition that the Taylor Grazing Act has permitted appropriation of land suitable for the Indian allotment without question to be withdrawn; and, then it is argued that the "too poor in quality" rule can be used by the Secretary on land identified as prior appropriated land as a yardstick for defeating the Indian Certificate Holder for allotment of land under the General Allotment Act.

It is not denied by respondents that the Secretary would be precluded from use of the "too poor in quality rule" prior to the Taylor Grazing Act allowing appropriation of land that was available to the Indian Certificate Holder under the Allotment Act of 1887.

The lower court holds that, the Allotment Act is still available, undiminished in its construction and purposes—however, the tree may be available but the limbs bearing

fruit have been amputated by the Interior Department's ruling under the simple expediency that the too poor in quality rule can be used by the Secretary in his classification on prior appropriated land. However, the rule would be precluded prior to the Secretary's appropriation of the land under authority of the Taylor Grazing Act. This rule precluding the Indian Certificate Holder from the allowance of allotments was not available for use by the Secretary prior to the Taylor Grazing Act and the Secretary has resorted to Interior Department ruling so as to permit the Secretary to usurp a function of Congress by his administrative decisions and the Secretary has in fact created a new allotment law under the rules and regulations promulgated and, by withdrawing the very lands from allotment the Congress had authorized to be distributed.

A result so inherently self-contradictory involves such thorough-going disregard of principles heretofore established by this Court as to call for review of the ruling below.

Respectfully submitted,

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February, 1968

APPENDIX "A"

ADMINISTRATIVE DECISIONS

PROPOSED DECISION
ATTACHMENT "A"

The following petitions for classification are hereby denied:

Indian Allotment, C-0124855, Edith Colbert Finch.
Township 19 South, Range 45 West, 6th P.M., Colorado,
Section 11: W½SW¼
Section 14: W½NW¼

Indian Allotment, C-0124856, William L. Colbert.
Township 19 South, Range 45 West, 6th P.M., Colorado
Section 19: NE¼

Indian Allotment, C-0124857, Farris Colbert Brown.
Township 19 South, Range 45 West, 6th P.M., Colorado
Section 11: E½SW¼
Section 14: E½NW¼

Indian Allotment, C-0125200, Shirley Reagan Heskitt.
Township 19 South, Range 45 West, 6th P.M., Colorado
Section 14: NE¼

Indian Allotment, C-0125259, Rogers King.
Township 19 South, Range 45 West, 6th P.M., Colorado
Section 14: SE¼

Indian Allotment, C-0125435, Sherrie Lee Heskitt
Township 19 South, Range 45 West, 6th P.M., Colorado
Section 10: S½NE¼

[APPENDIX]

Among the factors to be considered in classification of public lands under 43 Code of Federal Regulations, Part 2410 are:

1. The lands must be physically suitable or adaptable to the uses or purposes for which they are classified. In addition, they must have such physical and other characteristics as the law may require them to have to qualify for a particular classification.

2. All land classifications must be consistent with Federal programs and policies, to the extent that those programs and policies affect the use or disposal of the public lands.

Additional criteria for classification of lands as suitable for Indian allotment under 2212 include: (1) the lands are valuable for agriculture purposes, (2) the lands are, on the whole, suitable for a home for an Indian and his family, (3) the anticipated return from agricultural use of the land would support the residents and (4) the requirements for water supplies set forth, as follows, are met. Land may be classified for agricultural entry only if the rainfall is adequate or, if under State law, there is available to the land sufficient irrigation water to permit agricultural development of its cultivatable portions.

The lands applied for do not favorably meet these criteria for the following reasons, and therefore, are improper for classification as suitable for Indian allotment:

1. The land is not physically suited to cultivation and production of agricultural crops.

   The unstable soils of the tracts involved are extremely susceptible to wind erosion. As mentioned in the field data report, this area is frequented by drought conditions. The flood plain areas are susceptible to periodic flash floods causing detrimental deposition of soil which has an unfavorable effect upon the native vegetation of the low-lying

areas. The Kiowa County Soil Conservation Service land capability classification for the subject tracts is VI, which indicates the land to be unsuitable for cultivation and (is susceptible to damage when used for livestock grazing).

2. All land classifications must be consistent with Federal programs and policies, to the extent that those programs and policies affect the use or disposal of the public lands.

Should the land be cultivated, such use would be in direct conflict with National agriculture and conservation policy and programs. Present National agricultural policy calls for reduction of wheat and feed grains surpluses. Reduction of these and other surplus crops is being accomplished by voluntary acreage diversion and allotment programs with participants entitled to price supports on a portion of their production.

The President urged Congress to extend and improve present programs for wheat, feed grains, and other surplus crops in his annual farm message (February, 1965). He also recommended a long-range plan to remove between 50 million and 80 million acres of land from crop production and convert them to non-agricultural uses, to supplement present acreage diversion and allotment plans. The President subsequently signed the Food and Agricultural Act in November, 1965, which authorizes long term retirement of 40 million cropland acres for periods of 5 to 10 years.

Since present and expected future national agricultural policy is based on continued reduction of surplus crops through reduction of cropland acreage, it is not in the public interest to classify lands suitable for agricultural entry which could be used to produce price supported surplus crops or could become eligible for payments under cropland retirement programs.

[APPENDIX]

Farmers in 29 Eastern Colorado counties requested Federal aid to help offset wind erosion damage last year. On February 6, 1965, the U. S. Agricultural Stabilization and Conservation Service approved requests for $3,206,546 to finance listing and chiseling soil under the cost-share program to combat wind erosion damage on more than four million acres in Eastern Colorado (the request must also be aproved by the National Disaster Committee in Washington and the Secretary of Agriculture). In an area such as this, where a Federally financed conservation program to reduce wind erosion damage is planned, it is not in the public interest to classify land as suitable for agricultural entry which would be subject to wind erosion under cultivation.

The tracts contained in the attached field data report do not qualify under the additional criteria for classification as suitable for Indian allotment for the following reasons:

(1) The land applied for is primarily grazing land in type. The tracts have carrying capacities which range from 6-8 acres per A.U.M., or 72 to 96 acres are required to run 1 mature cow unit per year. This factor, which was verified with local S.C.S. officials, indicates that a maximum of 2½ cow units could graze each 160 acre tract applied for per year. During the normal winter season, cattle and other livestock in this area must receive supplemental feeds, which would detract from the economic feasibility of the operation. An average economic ranch unit in this area requires enough land to support in excess of 100 units of beef cattle, or must range in size from 6,000 to 8,000 acres. As indicated in the field data report, local S.C.S. officials stated that the average size farm in this area is 2,400 acres, with one-third of the acreage for wheat allotment. Potable water for irrigation

purposes is extremely difficult to locate and most farming operations are dependent upon natural precipitation.

The above-described Indian allotment petition-applications do not meet the requirements for an economic grazing unit for this type of land, and therefore, do not have the capability of serving the purposes of Section 4 of the General Allotment Act.

Form 2400--2 (July 1964) (formerly 4--1499a)	Date of Field Examination 8/27/65
UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT	Name of Applicant (Note below)
FIELD DATA	Serial Number (Note below)

(Narrative report. Use checklist V BLM 6.8, Illustration 7)

1. *Background and General Information*—The following petition-applications are being described within one field data report, as all of the tracts are contained in one large block of Federally administered land consisting of 880 acres (see Petition-Application map), which are similar in type and location. The central portion of this area was once below the water line of the Chivington Reservoir which reportedly washed-out during the summer floods of 1949. This area, excluding the S½NE¼ Sec. 10, T. 19 S., R. 45 W., is used as a wintering pasture by the grazing lessee and has been damaged due to over grazing. The tracts involved are located approximately 20 miles east of Eads, Colorado (1960 census: 1050) and 2 miles south of the community of Brandon. The general economy of this area is based on agriculture; i.e., wheat and other small grains, often supplemented by livestock production. There are no conflicts of record or previous actions involving the subject tracts contained herein.

C-0124855, Edith Colbert Finch—This petition-application involves the 160 acre tract, described as W½SW¼

Sec. 11 and W½NW¼ Sec. 14, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The unimproved subject tract is gently sloping (5°) and is composed of a shortgrass and tamarix aspect. It is accessible by county road and ½ mile of ranch road. The eastern portions of this tract are part of a flood plain which are moderately susceptible to wind and water erosion. There is a pit reservoir estimated to be located in the southeast portion of the tract, however, a survey would be necessary to determine its exact location.

C-0124856, William L. Colbert—This petition-application involves the 160 acre tract, described as NE¼ Sec. 15, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The gently rolling, upland tract has a shortgrass aspect. The unimproved subject tract in its native condition is less susceptible to erosion than the low-lying flood plain area. It is accessible by county road along its west boundary.

C-0124857, Ferris Colbert Brown—This petition-application involves a 160 acre tract, described as E½SW¼ Sec. 11 and E½NW¼ Sec. 14, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The moderately level, sandy flood plain has a native weed aspect. The subject tract is relatively susceptible to flooding with detrimental deposition of soil and active erosion. It is accessible by county road and ¾ mile of ranch road.

C-0125200, Shirley Reagan Heskitt—The subject petition-application involves 160 acres, described as NE¼ Sec. 14, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The gently rolling tract has a shortgrass-native weed aspect, which is moderately susceptible to wind and water erosion. An intermittent drainage traverses the tract in a northwesterly direction. The subject land is estimated to be 50 percent upland, shortgrass lope and 50 percent native-weed, flood plain. The tract is fenced along its north and east boundary with a four strand-barbed wire fence in fair condition.

1. *Background and General Information (Continued)*

C-0125259, Rogers King—The subject petition-application involves 160 acres, described as SE¼ Sec. 14, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The gently sloping area primarily consists of flood plain, with a native weed aspect. The tract is moderately susceptible to flooding with detrimental disposition of soil influencing native vegetable growth. The major drainage traverses the central portion of this tract. The tract is fenced along its west, south, and east boundaries with three and four strand barbed wire fencing in poor condition. It is accessible by county road and by ½ mile of private ranch road.

C-0125435, Sherrie Lee Heskitt—The subject petition-application involves 80 acres described as S½NE¼ Sec. 10, T. 19 S., R. 45 W., 6th P.M., Kiowa County, Colorado. The gently rolling, upland tract has a shortgrass aspect. It is accessible by county road. The tract is fenced along its south boundary and is intermixed with the grazing lessee's summer range.

2. *Occupany Factors*—The subject tracts are presently under Section 15 grazing lease to Mattie Lou and Joseph W. Dawson, Jr., Brandon, Colorado. The lease was issued for a ten year period beginning 5/1/65. The subject lands and adjacent lands have been used for livestock grazing and farming.

3. *Crop Factors*—The soils of the subject tracts range from sandy in the lower flood plain areas, to a sandy loam on the hilltops and slopes. The subject land, which ranges from gently sloping to rolling has been classified as Class VI by local Soil Conservation Officials. This classification indicates that the land should not be cultivated and is susceptible to damage when used for livestock grazing. Lands which are cultivated in this general area are typically level to gently rolling and well drained. The area has a growing season of 155 days, with an average annual precipitation of 13.66 inches. Droughts occur frequently in this area;

three-four years during a seven year period are generally below average precipitation. The local Agricultural Stabilization Service indicated that the average farm unit in this area is 2400 acres in size, cultivated as follows: ⅓ summer fallow, ⅓ wheat and ⅓ other small grain; especially, milo, millet, and sudan. Milo and wheat bases were set in Kiowa County in 1954 and it was indicated by the A.S.C. officials that bases on newly cultivated lands would not be issued. It was also indicated that potable water is very difficult to locate in this area and wells are generally very deep.

4. *Mineral Factors*—A U.S.G.S. report, dated April 26, 1965, indicates the subject lands to be valuable for sodium, potash, oil, and gas. The western portion of the subject lands are located in the area designated as the Brandon Field, and are within ½ mile from a producing oil well.

5. *Forestry Factors*—None.

6. *Grazing Factors*—

C-0124856 and C-0125435—These petition applications have a shortgrass aspect in fair range condition. The tracts have a plant density of 15 percent and a carrying capacity of 6 acres per AUM. The vegetative composition consists of blue grama, fringe sage, and sunflowers. These areas have moderately stable, sandy-loam soils.

C-0124855, C-0124857, and C-0125259—The subject tracts have native weed-tamarisk aspect, with small intermittent patches of blue grama. These areas have a plant density of 15 percent and a carrying capacity of 8-10 acres per AUM. The vegetative composition consists primarily of: salt grass, Russian thistle, ragweed, Koshia weed, sunflower, alkali sacatoni, cockle burr, three-own and salt cedar. These tracts are part of a flood plain which was once covered by the Chivington Reservoir. This relatively unstable soil is susceptible to wind and water erosion. Detrimental deposition of soil caused by flooding waters has

an unfavorable influence on the native vegetation. (This area offers excellent protection as a livestock wintering pasture.)

C-0125200—The subject tract is similar to a combination of the grazing types described above. The southwest portion is flood plain in type, while the northeast corner is gently sloping, shortgrass slopes. The tract has an average plant density of 15 percent and a carrying capacity of 8 acres per AUM.

7. *Intensive Use Factors*—The subject tracts have highest and best uses for limited livestock grazing; e.g., as a wintering pasture.

8. *Other Factors*—None.

EXHIBIT NO. 1

UNITED STATES	5.22B
DEPARTMENT OF THE INTERIOR	C-0124855—1A
Bureau of Land Management	C-0124856—1A
COLORADO LAND OFFICE	C-0124857—1A
15019 Federal Building	C-0125200—1A
1961 Stout Street	C-0125259—1A
Denver, Colorado 80202	C-0125435—1A

June 22, 1966

Robert O. Swimmer
Attorney at Law
315 Leonhardt Bldg.
Oklahoma City, Oklahoma 73102

Dear Mr. Swimmer:

On behalf of the following applicants you protested the initial decision of April 1, 1966 denying the classification of the lands embraced in their petition-application for Indian allotments:

Colorado 0124855—Edith Colbert Finch
0124856—William L. Colbert

0124857—Farris Colbert Brown
0125200—Shirley Reagan Heskitt
0125259—Roger King
0125435—Sherrie Lee Heskitt

The protest was analyzed by the Director's office and reviewed by the Office of the Secretary. The conclusion was that no facts had been presented to prove that the classification was in error. The Secretary, therefore, did not assume jurisdiction over the case.

Under the circumstances, the initial decision denying the petitions for classification has become a final order and is reviewable only in a court of competent jurisdiction.

The cases are now closed on the records of the land office.

Sincerely yours,

Everett K. Weedin /s/

Everett K. Weedin
Assistant Manager
Branch of Lands Adjudication

APPENDIX "B"

OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA—No. 66-278 Civil

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
Feb 3 1967
VERA L. HOWARD
Clerk U. S. District Court
By LaDana Smith
Deputy

EDITH COLBERT FINCH, WILLIAM L. COLBERT, FARRIS COLBERT BROWN, SHIRLEY REAGAN HESKITT, ROGER KING, SHERRIE LEE HESKITT,

Plaintiffs,

vs. No. 66-278 CIVIL

UNITED STATES OF AMERICA and STEWART UDALL, Secretary of United States Department of the Interior,

Defendants.

Robert O. Swimmer, Oklahoma City, Oklahoma, Attorney for Plaintiffs.

B. Andrew Potter, United States Attorney, Oklahoma City, Oklahoma; Robert L. Berry, Assistant United States Attorney, Oklahoma City, Oklahoma; Lyle R. Griffis, Attorney, Department of Interior, Anadarko, Oklahoma, Attorneys for Defendants.

OPINION

Before LUTHER BOHANON, United States District Judge.

In this case all of the plaintiffs were represented by Robert O. Swimmer, Attorney at Law, and the defendants were represented by B. Andrew Potter, United States Attorney, and Robert L. Berry, Assistant United States Attorney.

The parties by agreement have submitted this case for decision upon the pleadings, briefs, and the records of the Department of Interior, which are contained in the file.

This action is brought to obtain a Judgment directing the United States of America and the Secretary of the Interior to issue patents to the respective plaintiffs to certain lands to which they claim they are entitled as allotments under Section 4 of the General Allotment Act of February 8, 1887;[1] plaintiffs also seek a Judgment against the United States for damages in the sum of a total of $192,000 because of the failure and refusal of the Department of Interior to issue patents upon their respective applications.

The plaintiffs invoke jurisdiction of the Court under Section 2 of the Act of February 6, 1901,[2] and assert that the individual plaintiffs are Indians who are entitled to allotments of land and that the Court is empowered to require the issuance of allotment patents under Section 1 of the 1901 Act.[3]

The General Allotment Act, Section 4, supra, provides in substance that where any Indian not residing upon a reservation shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled on application to the local Land Office to have the same allotted to him or to her. The plaintiffs filed Indian allotment applications with the Area Director of the Muskogee Area Office, Bureau of Indian Affairs, and received certificates that they were

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[1] 24 Stat. 389, as amended, 25 U.S.C. 334.

[2] 31 Stat. 760, as amended; 25 U.S.C. 346.

[3] 25 U.S.C. 345.

eligible as Indians to receive land on the public domain under Section 4 of the Act of February 8, 1887, supra. The plaintiffs thereafter filed applications with the Land Office of the Bureau of Land Management in Denver, Colorado, for allotments in Sections 10, 11, 14, and 15, Township 19 South, Range 45 West, Sixth Principal Meridian, Kiowa County, Colorado. The plaintiffs, except Sherrie Lee Heskitt, sought allotments on 160 acres of land, and Sherrie Lee Heskitt sought an allotment on 80 acres. On April 1, 1966, the State Director of the Bureau of Land Management, Denver, Colorado, rendered a decision refusing to classify the lands located in Colorado as suitable for Indian allotments under Section 4 of the General Allotment Act, supra. It was concluded that the lands applied for do not have the capability of serving the purposes for which Section 4, supra, was enacted, and that the land is not able to support an Indian family, 43 C.F.R. 2410.1-3(d)(6). The decision of the State Director was submitted by plaintiffs for review by the Secretary of the Interior, and the Secretary failed to exercise his supervisory authority. Therefore, the decisions of the State Director became final administrative orders thirty days after the issuance thereof, under 43 C.F.R. 2411.1-(d)(e).

Prior to the filing of the applications by the plaintiffs with the Land Office in Denver, the described lands had been classified as a portion of a grazing district pursuant to the Taylor Act of June 28, 1934.[4]

By Executive Order No. 6190, dated November 26, 1934, all of the vacant, unreserved, and unappropriated public lands in the State of Colorado were withdrawn from settlement, location, sale, or entry, and were reserved for classification and determination of its most useful purpose pursuant to the provisions of the Taylor Act, supra. The lands to which plaintiffs seek allotments were determined to be the most useful for grazing purposes.

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[4] 48 Stat. 1269; 43 U.S.C. 315, et seq.

In denying the applications, the Secretary expressly found and concluded that the lands applied for do not have the capability of serving the purposes for which Section 4 of the General Allotment Act was enacted, and therefore, the applications were denied.

It is admitted that plaintiffs have exhausted their administrative remedies, and this case is before this Court for judicial review of the administrative acts of the Secretary, and his subordinates.

After careful review of the decisions and findings of the Secretary of Interior, the Court finds that the procedure followed was that prescribed by the appropriate statutes; the Court further finds that the Secretary and his subordinates, in denying said applications, did not act arbitrarily or capriciously, nor did he or his subordinates abuse their legal discretion, but acted in accordance with law. The decisions reached in the separate applications did not violate any Constitutional right of any of the applicants. Further, the Court finds that the decisions were not in excess of the statutory authority of the Secretary. The Court finds that the decisions reached upon each of the applications involved in this case by the Secretary of the Interior, and his subordinates, are supported by substantial evidence, and that the facts before the Court do not warrant a trial de novo.

Regarding claims for money damages against the United States, there is no merit to these claims. The United States is immune from suit, save as it consents. No consent is present here. U. S. vs. Sherwood, 312 U.S. 584.

Based upon the foregoing judicial review, and the findings of the Court, it is the Judgment, Order, and Decree of this Court that the decisions of the Secretary of Interior, and his subordinates, in denying the applications of the respective plaintiffs for allotments, is sustained, and the Complaint of the plaintiffs herein should be and the same is denied as to all claims.

DATED this 3rd day of February, 1967.

LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EDITH COLBERT FINCH, WILLIAM L. COLBERT, FARRIS COLBERT BROWN, SHIRLEY REAGAN HESKITT, ROGER KING, SHERRIE LEE HESKITT, Plaintiffs,	)	
vs.	)	No. 66-278 CIVIL
UNITED STATES OF AMERICA and STEWART UDALL, Secretary of United States Department of the Interior, Defendants.	)	

ORDER AND JUDGMENT

Based upon the Opinion filed herein on the 3rd day of February, 1967, and the findings of the Court contained therein,

IT IS ORDERED, ADJUDGED AND DECREED BY THIS COURT that the decision of the Secretary of Interior and his subordinates in denying the application of the respective plaintiffs, namely: Edith Colbert Finch, William L. Colbert, Farris Colbert Brown, Shirley Reagan Heskitt, Roger King, Sherrie Lee Heskitt, for allotments, is affirmed, and the prayer for a money judgment of the plaintiffs is denied, and the Complaint of the plaintiffs herein is denied in all things and dismissed.

DATED this 6th day of February, 1967.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

Endorsed: Filed February 6, 1967, Vera L. Howard, Clerk, by LaDana Smith, Deputy

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APPENDIX "C"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OF THE UNITED STATES—No. 9474

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
November Term, 1967

FILED
United States Court of Appeals
Tenth Circuit
Dec 20 1967
WILLIAM L. WHITTAKER
Clerk

EDITH COLBER FINCH, WILLIAM L. COLBERT, FARRIS COLBERT BROWN, SHIRLEY REAGAN HESKITT, ROGER KING, SHERRIE LEE HESKITT,	)	
Appellants,	)	
v.	)	No. 9474
UNITED STATES OF AMERICA and STEWART UDALL, Secretary of United States Department of the Interior,	)	
Appellees.	)	

Appeal from the United States District Court
for the Western District of Oklahoma

Robert O. Swimmer for Appellants.

Raymond N. Zagone (Edwin L. Weisl, Assistant Attorney General, B. Andrew Potter, United States Attorney, Robert L. Berry, Assistant United States Attorney and S. Billingsley Hill, Department of Justice, were with him on the brief) for Appellees.

Before PHILLIPS, JONES* and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Appellants, six in number and each of Indian descent, filed appropriate applications with the Bureau of Indian Affairs and received certificates that they were eligible as Indians to receive an allotment of land from the public domain under the terms of 25 U.S.C. § 334. Thereafter appellants subjectively selected certain lands located in Kiowa County, Colorado, and applied to the Land Office of the Bureau of Land Management at Denver for allotment of such lands to them. The chosen lands had been withdrawn from settlement and reserved for classification by Executive Order No. 6910 (November 26, 1934) with subsequent acknowledgement and implied approval of Congress through passage of the Taylor Grazing Act, 43 U.S.C. § 315(f). Appellants therefore also petitioned the Land Board to reopen the lands for settlement pursuant to authority under the Taylor Grazing Act and as a necessary incident to the granting of an allotment. The Land Office rejected the petitions and applications after reaching the conclusion that the subject lands would not support an Indian family and were thus unsuited for Indian allotment. Findings concerning the location, topography, vegetation, land tenure pattern and general economy of the area were entered after a field examination had been made of the designated lands. The findings and conclusions of the Land Office became those of the Secretary of the Interior when he failed to act within thirty days upon appellants' request for review. 43 C.F.R. § 2411.1-1(d, e).

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* Of the Fifth Circuit, sitting by designation.

Appellants then initiated this action in the District Court for the Western District of Oklahoma asserting a right to the issuance of patents for the lands or, in the alternative, damages against the United States in the sum of $192,000. After review of the administrative record the District Court held that the Secretary had acted within his authority and discretion and denied relief, 263 F. Supp. 309. It is admitted that appellants have exhausted their administrative remedy and the jurisdiction of the District Court and of this court to review is not disputed.

The attack on the Secretary's decision as being arbitrary and capricious is not leveled against the specifics of the Secretary's findings that the selected lands are too poor to support an Indian family in the sense that the lands could be successfully used for grazing and complete self-support for appellants. In fact, appellants represent that they are non-reservation Indians and wish the lands, admittedly suitable for grazing when used in conjunction with more extensive holdings, to supplement their income and not for the single purpose of complete support. Appellants' claim is much broader and asserts that the Secretary's application of the "too poor in quality" test under present conditions constitutes a complete sterilzation of the Indian right to allotment. With substantially all of the public lands now withdrawn from open entry and settlement absent the Secretary's discretionary right to reclassify for entry, the rights of Indians conferred in the Allotment Act, so say appellants, can be and are completely abrogated contrary to law. Such an argument abounds with political overtones and must be directed to Congress unless the acts of the Secretary find no justification in existent congressional mandates which do not extinguish rights once conferred. See Chase v. United States, 8 Cir., 222 Fed. 593; United States v. Arenas, 9 Cir., 158 F2 730, cert. denied 331 U.S. 842.

The language from section 4 of the General Allotment Act, supra, on which appellants primarily rely reads as follows:

"Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, . . . and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title."

Stripped to its bare form, appellants' contention is that under authority of this provision they are entitled to make selections and having done so are entitled to the issuance of patents covering the particular lands selected and that this right is not subject to any discretion in the Secretary and cannot be defeated by the latter's exercise thereof.

The government's position is that Congress by enacting the Taylor Grazing Act of 1934, supra, has provided otherwise. The applicable language, from the amended act of 1936, supra, reads as follows:

"Sec. 7. That the Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), . . . Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: . . ."

We deem appellants' argument to be unsound. It seems an impalpable contention that Congress intended to place the public domain beyond discretionary control and vest in individual Indian applicants an absolute right to the land of their choice. Great weight is lent to this conclusion

by section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended by section 17 of the Act of June 25, 1910, 36 Stat. 860, 26 U.S.C. § 336, in which Congress supplemented the General Allotment Act in providing that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper. . . ." The Taylor Act, supra, subsequently gave the Secretary of the Interior express discretionary authority to classify withdrawn lands and proscribed disposition, settlement or occupation until after such classification.

The appellants err not in asserting their right to an allotment but in asserting that they have an absolute right to the particular lands in question. The Secretary's construction of the Taylor Act is consistent with the Allotment Act as viewed in light of the language from the 1891 Act quoted above. As the Secretary said in John E. Balmer, 71 I.D. 66, 68 (1964), "An Indian applicant is not, of course, deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land that is suitable for acquisition under the Allotment Act."

The Secretary's construction recognizes the right of an Indian applicant to an allotment and therefore gives effect to the Allotment Act, but at the same time gives validity to the Taylor Act which implements the policy that the "power to withhold from improper disposition and unwise uses is essential to the national policy of conservation of the rapidly diminishing public domain and its natural resources." Carl v. Udall, D.C. Cir., 309 F2 653, 657, citing an earlier opinion by the Secretary.[1] Nor is conservation the only reason for discretionary control. The President acting through the Interior Department must determine the agricultural suitability of the land and whether or not an allotment will be in the best interest of the In-

[1] Department of the Interior, Nelson A. Gerttula, Substitute-attorney-in-fact for W. E. Howell, attorney-in-fact for Frank L. Huston, Spokane 018338, Appeal from the General Land Office (A. 23158; Dec. 31, 1941).

dian. See Wise v. United States, 10 Cir., 297 F2 822, cert. denied 369 U.S. 876. Not until these discretionary acts have been followed by the issuance of a patent does the allottee have a vested right to any particular plot of land. Raymond Bear Hill, 52 L.D. 688 (1929). See also Woodbury v. United States, 8 Cir., 170 Fed. 302; LaRoque v. United States, 239 U.S. 62.

The problems inherent in the administration of the public domain are many and there is no doubt that each time Congress legislates upon a subject having such a common denominator later acts have an impact upon earlier ones. Under the terms of the General Allotment Act, supra, Indians can "make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated" and by regulation cannot be refused an allotment from unreserved lands because the lands are too poor in quality. 43 C.F.R. 2210.0-7(a)(3) provides:

> "Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor cannot be denied on the grounds that the lands are too poor in quality."

The regulation is not specifically applicable in the case at bar because the chosen lands are not unreserved nor have appellants made settlement[2] thereon. Daniels v. United States, W.D. Okl., 247 F. Supp. 193. However from this regulatory premise appellants assert that if the Secretary is precluded from denying an allotment upon poor quality unreserved land then he should be denied the right to refuse allotment upon reserved land because "there is no land left for the Indian to make application on except reserved land." The argument is legally faulty. The impact

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[2] If there has been an actual good faith settlement and an attempt is being made to eke an existence from the land by agricultural pursuits, then there is more than ample justification for a regulation which prevents the Indian family from being uprooted and forced from its occupancy. This is not the case before the court.

of the Executive withdrawal of public lands in 1934, noted with congressional approval in the 1936 amendment to the Taylor Grazing Act, and the grant of discretionary power to the Secretary in the Act to reclassify lands, does no more to the General Allotment Act than make settlement a condition subsequent to allotment. The right to allotment persists and is not "sterilized" but now provides for an administrative judgment about suitability prior to rather than after settlement. The General Allotment Act never did and does not now vest a right to particular lands to a particular Indian upon selection. Approval of his selection and location never was and is not now a mere ministerial duty of the Secretary. Wise v. United States, supra; Lemieux v. United States, 8 Cir., 15 F2 518, cert. denied 273 U.S. 749.

The appellants assert that the lands in question have great potential as oil-producing lands. We consider this to be irrelevant. The question of value relates to agricultural value in keeping with the intent of the Allotment Act to provide, in effect, a homestead which would sustain an Indian family. The Secretary has so construed the purpose of the Act. John E. Balmer, 71 I.D. 66 (1964).

We find no error in the administrative process nor abuse of discretion by the Secretary in determining that the lands were unsuitable.

The judgment of the District Court is affirmed.

APPENDIX "D"

STATUTES, REGULATION AND TREATIES

1) Section 4 of the General Allotment Act of 1887, 24 Stat., 388, 389, as amended; 25 U.S.C., Section 334,.

"Allotments to Indians not residing on Reservations:

"Where any Indian is not residing upon a reservation or for whose tribe no reservation has been provided by treaty, Act of Congress or Executive Order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated. He or she shall be entitled, upon application to the local Land Office for the District in which the lands are located to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in Sections 331-334, 339, 341, 342, 348, 349 and 381 of this Title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the land, so as to conform thereto; and Patents shall be issued to them for such lands in the manner and with the restrictions as provided in Sections 348 and 349 of this Title, and the fees to which the officers of such local Land Office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any monies in the Treasury of the United States not otherwise appropriated, upon a statement of account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior. February 8, 1887, c. 119, Section 4, 24 Stat. 389; 1946 Reorganization Plan No. 3, Section 403, eff. July 16, 1946, 11 F. R. 7876, 60 Stat. 1100.

2) Section 7 of the Taylor Grazing Act, June 28, 1934 48 Stat. 1269, 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C., Section 315(f).

"Homestead Entry Within District or Withdrawn Lands:

"Classification:

"Preferences: The Secretary of the Interior is hereby authorized in his discretion to examine and classify any lands withdrawn or reserved by Executive Order of November 26, 1934 (numbered 6910), and amendments thereto. An Executive Order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or are more valuable or suitable for any other use than for the use provided for under this chapter, or for acquisition and satisfaction of any outstanding lien, exchange or script rights or land grants, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public land laws, except that homestead entries shall not be allowed for tracts exceeding 320 acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and open to entry; provided, that locations and entries under the mining laws, including Sections 181-184, 185-188, 189-192, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229A, 241, 251 and 261-263 of Title 30, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this chapter. Where such lands are located within grazing districts, reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection or location, is allowed, shall be entitled to the possession and use of such lands; provided, that upon the application of any applicant qualified to make entry, selection or location under the Public Land Laws filed in the Land Office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior,

shall entitle the applicant to a preference right to enter, select or locate such lands if opened to entry as herein provided. June 28, 1934, c. 865, Sections 7, 48 Stat. 1272; June 26, 1936, c. 842, Title I, Section 2; 49 Stat. 1976.

3) Act of February 6, 1901, 31 Stat. 1760, as amended, 25 U.S.C., Section 346

Proceedings in actions for allotments:

"The plaintiff shall cause a copy of his petition filed under Section 345 of this title to be served upon the United States Attorney for the District wherein suit is brought, and shall mail a copy of the same by registered letter to the Attorney General of the United States, and shall thereupon cause to be filed with the Clerk of the Court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the United States Attorney upon whom service of petition is made as aforesaid to appear and defend the interest of the Government in the suit, and within 60 days after the service of petition upon him, unless the time should be extended by order of the Court made in the case to file a plea, answer or demurrer, on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages or other demand or defense whatsoever of the Government in the premises; provided, that should the United States Attorney neglect or refuse to file the plea, answer or demurrer or defense as required, the plaintiff may proceed with the case under such rules as the Court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim or any part thereof, unless he shall establish the same by proof satisfactory to the Court. February 6, 1901, c. 217, Section 2; 31 Stat. 760; June 25, 1948, c. 646, Section 1, 62 Stat. 909."

4) 43 C.F.R. 2212.2-2 Allotments:
43 C.F.R. 2212.2-1

"(a) When the manager approves an application for allotment, he will issue to the applicant a 'Certificate of

Allotment,' on a prescribed form, showing the name in full of the applicant, post office address, name of the tribe in which membership is claimed, serial number of the certificate issued by the Commissioner of Indian Affairs, and a description of the land allotted.

"(b) Where the application under investigation is that of a single person over 21 years of age, or of the head of a family, report will also be made as to the character of the applicant's settlement and improvement. A similar report will be made on applications filed in behalf of minor children as to the character of the settlement and improvement made by the parent, or the person standing in loco parentis, or his or her own allotment under the fourth section.

(5) "Questions and Answers about Indian Allotments on Public Lands" May 1964,

P. 3-4—Bulletin

"What are the Chances of Public Land being Classified for An Allotment?"

"Very Small, The Forest Service does not believe any lands within national forest qualify for either homesteading or allotment purposes. Opportunities elsewhere are somewhat greater but still small because little cultivable land remains in the public domain. What does remain usually requires extensive improvements, chiefly wells and irrigation systems. The grazing lands provide limited amounts of forage and often only on a seasonable basis. The acreage allowance of the Allotment Act (40 to 160 acres) makes it quite unlikely to find a tract of land which would yield a reasonable income from farming or grazing."

P. 6—Bulletin

"Decisions After Enactment of the Taylor Grazing Act"

"After the passage of the Taylor Grazing Act, virtually all unappropriated public lands outside of Alaska

were withdrawn from entry. Section 7 of the Taylor Grazing Act permits the Secretary of the Interior to revoke this withdrawal under certain stated conditions. Decisions issued after the Taylor Grazing Act was passed make reference both to the settlement nature of the allotment act and also to other factors which now apply."

Examples state:

"Upon consideration of the record (of this case), however, the Department is not persuaded that the land is not primarily and chiefly valuable for timber or that, if cleared, it would comprise an economic farm unit, and therefore, it is believed that land should be retained in public ownership" (A-23961 December 11, 1944). ". . . the fact that the land applied for . . . is valuable for timber is not a sufficient ground, in itself, for the rejection of (an) application." ". . . the primary question then, is whether (he) made a settlement in good faith on the land in question and acquired a right to an allotment of the land prior to the time when the withdrawal of November 26, 1934, was made. Such a right, if in existence on November 26, 1934, would not be affected by the withdrawal order, as the withdrawal was made subject to existing valid rights."

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No. 1136

In the Supreme Court of the United States

OCTOBER TERM, 1967

EDITH COLBERT FINCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND STEWART UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 387 F. 2d 13. The opinion of the district court (Pet. App. B) is reported at 263 F. Supp. 309. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. A), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1967. The petition for a writ of certiorari was filed on February 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

294-223—68

QUESTION PRESENTED

Whether the Secretary of the Interior's rejection of petitioners' applications for the allotment of specific tracts of land was proper.

STATUTES INVOLVED

Section 4 of the General Allotment Act of 1887, 24 Stat. 389, as amended, 25 U.S.C. 334, provides:

> Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331–334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title. * * *

Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f, reads as follows:

> Sec. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved

by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *

STATEMENT

Petitioners, each of whom is of Indian descent, filed applications with the Bureau of Indian Affairs and received certificates that they were eligible to receive an allotment of land pursuant to the General Allotment Act of 1887, 25 U.S.C. 334. Thereafter, petitioners selected lands which they desired and applied to the Bureau of Land Management to have these lands allotted to them. However, the lands which petitioners selected had previously been withdrawn from settlement by Executive Order No. 6910 and, pursuant to the provision of the Taylor Act, had been classified as grazing land by the Secretary of the Interior. Petitioners, therefore, also asked the

Bureau of Land Management to reopen the land for settlement pursuant to its authority under the Taylor law.

After considering the topography, vegetation, land tenure pattern and general economy of the area, the Bureau of Land Management found that the land in question was not suitable for agricultural purposes and would not support an Indian family. The Bureau concluded that the land was not suited for an Indian allotment and, therefore, rejected petitioners' applications.[1]

Petitioners instituted this action to compel the Secretary of the Interior to allot to them the lands which they had selected. The district court sustained the Secretary's determination that petitioners were not entitled to have the specific land in question allotted to them and, therefore, dismissed the complaint. The court of appeals affirmed.

ARGUMENT

Petitioners' basic contention is that the General Allotment Act of 1887 conferred on them a vested right to select for allotment any land that was available for settlement at the time that Act was passed, regardless of any subsequent action by Congress or the Executive. However, there is no statutory basis for petitioners' claim of a vested right to allotment of specific lands. While Section 4 of the General Allotment Act of 1887 confers a right to an allotment, it is clear

[1] The findings and conclusions of the Land Office became those of the Secretary of the Interior when he failed to act within thirty days upon appellants' request for review. 43 C.F.R. § 2411.1-1(d), (e).

that it confers no right to specific lands. Section 4 itself requires that the public lands selected be "not otherwise appropriated."[2] Here the land which petitioners selected has been "otherwise appropriated" by withdrawal from all entry until favorable classification by the Secretary, "in his discretion," pursuant to Section 7 of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended, 43 U.S.C. 315f.[3]

Petitioners' assertion of a vested right to allotment of particular lands is contrary to the decided cases and the consistent administrative construction of the relevant statutes. In *LaRoque* v. *United States,* 239 U.S. 62, 65, this Court quoted with approval the statement in *Woodbury* v. *United States,* 170 Fed. 302, 305 (C.A. 8), that "Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property." See, also, *Wise* v.

[2] Section 4 also requires that the Indian seeking the allotment shall have "settled" on the land. Petitioners had not settled on the land which they sought.

[3] In amending Section 7 of the Taylor Grazing Act of 1934, Congress in 1936 expressly acknowledged the withdrawal effected by Executive Order No. 6910 and thereby ratified it. Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f; cf. *Brooks* v. *Dewar*, 313 U.S. 354, 360–361. There is thus no substance to petitioners' assertions that the Secretary has usurped a function of Congress or that the Secretary has abused his statutory authority.

That Congress did not intend to confer unqualified rights to any lands selected also appears from Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended by Section 17 of the Act of June 25, 1910, 36 Stat. 860, 25 U.S.C. 336, which supplemented the General Allotment Act in providing that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *."

United States, 297 F. 2d 822, 825–827 (C.A. 10), certiorari denied, 369 U.S. 876 ("Enactment of allotment legislation does not of itself vest any rights to allotments."); *Lemieux* v. *United States,* 15 F. 2d 518, 521–522 (C.A. 8), certiorari denied, 273 U.S. 749; *Daniels* v. *United States,* 247 F. Supp. 193, 194–195 (W.D. Okla.);[4] *Raymond Bear Hill,* 52 L.D. 688, 691–692; *Allotment Selections on the Fort Belknap Indian Reservation,* 55 I.D. 295, 301–304; *John E. Balmer,* 71 I.D. 66, 67–68; *Clark Jr.* v. *Benally,* 51 L.D. 98, 101.

Finally, the Secretary's refusal in this case to reclassify the land in question and allot it to petitioners was entirely proper. The thrust of the allotment process was to place Indians in possession and ownership of agricultural lands which would sustain an Indian family engaged in pastoral pursuits.[5] See *United States* v. *Payne,* 264 U.S. 446, 448–449; *Wise* v. *United States,* 297 F. 2d 822, 825 (C.A. 10), certiorari denied, 369 U.S. 876; *Daniels* v. *United States,* 247 F. Supp. 193, 195 (W.D. Okla.); *John E. Balmer,* 71

[4] Claims similar to those of petitioners are awaiting decision by the Ninth Circuit in *Amos Hopkins (Dukes) v. United States and Udall* (No. 21456, argued Dec. 4, 1967).

[5] It is thus irrelevant that the lands selected may be valuable for uses other than agricultural or may support limited seasonal grazing, or that the Indian applicant desires the lands to supplement his income (Pet. 10), or that the availability of agricultural (including grazing) lands has diminished (Pet. App. D xxvi).

I.D. 66, 67–68.[6] Petitioners do not challenge the Secretary's findings, after extensive field examination, as revealed by the administrative record (Pet. App. A i-x), that the public lands here involved are not suited for agricultural use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioners' reliance on the Forest Reserve cases, *United States* v. *Northern Pac. Ry. Co.*, 256 U.S. 51, and *United States* v. *Northern Pacific Ry. Co.*, 311 U.S. 317, is misplaced. No rights in specific lands were vested by the General Allotment Act, as previously shown. Since Congress has plenary power to dispose of property held by the United States, to the extent that private rights have not vested, *Alabama* v. *Texas*, 347 U.S. 272, 273–274, *Gibson* v. *Chouteau*, 13 Wall. 92, 99, there is no merit in petitioners' claim of a taking of property contrary to the Fifth Amendment, U.S. Const. (Pet. 11–13).

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